

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL RAYMOND HAZEN,

Defendant-Appellant.

UNPUBLISHED

April 11, 1997

No. 190900

Kalamazoo Circuit Court

LC No. 95-0857 FC

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and of assault with intent to commit second-degree CSC, MCL 750.520g(2); MSA 28.788(7)(2). Defendant was sentenced to five to ten years' imprisonment for assault with intent to commit second-degree CSC, and ten to thirty years' imprisonment for first-degree CSC. He appeals as of right. We affirm.

I

Defendant first argues that the evidence was insufficient to sustain his convictions. We disagree.

In reviewing a claim of insufficiency of evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether it is sufficient to prove the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992) amended 441 Mich 1201-1202. This standard inherently precludes this Court from interfering with the factfinder's task of weighing the evidence or making determinations regarding the credibility of witnesses. *Id.* at 514-515.

On the charge of first-degree CSC, defendant specifically contends that the prosecution failed to establish the essential element of penetration. Sexual penetration is defined as any "intrusion, however, slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(1); MSA 28.788(1)(1); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995).

Defendant argues that the child victim's testimony was not credible because when asked at one point whether defendant touched her inside or outside, the child responded, "The outside, or inside." However, it is not for this Court to interfere with the factfinder's responsibility of determining a witness' credibility. *Id.* Further, we note that there were at least five other instances in which the child clearly stated that defendant touched her "inside" and that she felt his fingers inside of her "private" and that "it hurt." Upon careful review of the record, we conclude that the evidence, taken in the light most favorable to the prosecution, was sufficient to justify a reasonable trier of fact in finding that penetration did in fact occur and that the elements of first-degree CSC were therefore proved beyond a reasonable doubt.

Defendant also argues that the evidence was insufficient to convict him of assault with intent to commit second-degree CSC because the assault element was not established. The essential elements that must be shown are an assault, involving the use of force or coercion; a sexual purpose; and an intent to have sexual contact. *People v Evans*, 173 Mich App 631, 635; 434 NW2d 452 (1988); *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). This Court held in *Snell, supra* at 757, that the use of force or coercion is an aggravating circumstance that will satisfy the element of attempting or threatening a sexual act as part of the assault. Although the victim's hand in this case never actually touched defendant's penis, the victim testified that defendant grabbed her hand, pulled it toward him, denied her first plea to stop, attempted to get her to touch his penis, and told her, while she was crying, "It won't bite." We therefore conclude that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to show that defendant used force and coercion to put the victim in apprehension that he was forcing her to touch his penis with her hand; therefore, all of the elements of the assault conviction were proved beyond a reasonable doubt.

II

Defendant next contends that he was denied a fair trial because of his trial counsel's failure to investigate and prepare for trial, failure to properly cross-examine witnesses or present any defense, and because his trial counsel admitted defendant's guilt to the assault charge in closing argument. Except for the claim regarding admitting defendant's guilt, all other claims of ineffective assistance were waived on appeal because defendant failed to sufficiently argue the claims in his brief. *Dresden v Detroit Macomb Hosp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

With regard to defendant's remaining claim that trial counsel conceded defendant's guilt on one of the charges against him, this Court's review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). In order to prevail on a claim of ineffective assistance of counsel, defendant must show that his trial counsel's performance was deficient as measured against prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), and that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant's sole argument is that his counsel's tactic cannot be explained as trial strategy. However, this Court has consistently held that counsel's strategy of admitting defendant's guilt on some elements or crimes that the evidence strongly supports, while denying others, does not necessarily render ineffective assistance. *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988); *People v Wise*, 134 Mich App 82, 99; 351 NW2d 255 (1984). Similarly, this Court will not second-guess trial counsel's strategy in this case to admit defendant's guilt on a charge where the evidence was overwhelming and consistent, in an attempt to boost defendant's credibility and gain an acquittal on another more serious charge where the evidence was not as consistent. Because defendant failed to show that trial counsel's performance fell below an objective standard of reasonableness, we need not address whether defendant was prejudiced by counsel's strategy.

III

Finally, defendant argues that he must be resentenced because the trial court failed to consider the established sentencing factors or articulate its reasons for sentencing, deviated from the recommended sentencing guidelines, and violated proportionality principles. We disagree.

The trial court has broad discretion to tailor each sentence to the circumstances of the case and the offender. *People v Van Etten*, 163 Mich App 593, 595; 415 NW2d 215 (1987). This Court's review is limited to whether the sentencing court abused its discretion, and this Court will not find an abuse of discretion where the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). Some of the permissible factors considered in sentencing include: the nature and severity of the crime, *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989); the circumstances surrounding the criminal behavior, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985); the defendant's attitude toward his criminal behavior and the defendant's lack of remorse, *id.*; and the effect of the defendant's crime on his victim, *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987). Upon review of the record at sentencing, we conclude that the trial court correctly articulated its reasons for sentencing and did not exceed the scope of permissible considerations.

Defendant further argues that the trial court erred in deviating from the guidelines for reasons already considered in the guidelines. Sentencing guidelines are merely tools and do not convey substantive rights to defendants, *People v Potts*, 436 Mich 295, 303; 461 NW2d 647 (1990); however, deviation from the guidelines, although permissible, is subject to careful scrutiny. *People v Milbourn*, 435 Mich 630, 656-657; 461 NW2d 1 (1990). In the present case, the guidelines for conviction of first-degree CSC provided for three to eight years' imprisonment. The trial court sentenced defendant to ten to thirty years' imprisonment and indicated it exceeded the guidelines because of the threat defendant made to the victim and because of the nature of the relationship between defendant and the victim and her continued risk of harm by defendant.

We note that the relationship between the defendant and the victim is an important factor not included in the guidelines. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). In the

present case, the trial court stated that in addition to the threat made to the victim, which was not reflected in the guidelines, it exceeded the guidelines to ensure that defendant was incarcerated until the victim reached the age of majority so that she would have the freedom of choice to avoid contact with defendant. Defendant argues that the latter factor was considered in Offense Variable 7, which accounts for a defendant's exploitation of a victim due to youth or abuse of authority. However, we conclude that it does not account for the nature of the special trust relationship that existed between the victim and defendant in this case. Therefore, we do not believe that the trial court abused its discretion in sentencing defendant.

Affirmed.

/s/ Clifford W. Taylor

/s/ Harold Hood

/s/ Roman S. Gibbs